

Amandeep Kaur v Mukasey 05-70743

MAR 12 2008

BERZON, Circuit Judge, dissenting:

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U.S. COURT OF APPEALS

I respectfully dissent.

It is impossible to tell from the BIA's extremely cursory opinion in this case the legal and factual grounds for its decision. In particular, neither the BIA nor the IJ mentioned in their analysis that Kaur testified that the government official who ripped off her blouse was attempting to rape her, so we cannot tell whether and how that evidence was taken into account. On that basis alone, I would remand to the BIA for explicit consideration of the critical attempted rape testimony. *See Stoyanov v. INS*, 172 F.3d 731, 736 (9th Cir. 1999) ("[T]he BIA must provide a reasoned analysis of the legal basis for its holding, specifying as well the particular facts on which that holding relies."). More specifically:

I agree with the majority that because the BIA was silent on the issue of credibility, we presume that Kaur was credible. *See Krotova v. Gonzales*, 416 F.3d 1080, 1084 (9th Cir. 2005). That presumption means to me that we assume that the police officer actually did attempt to rape Kaur, as that is what she said. *Ladha v. INS*, 215 F.3d 889, 900 (9th Cir. 2000) ("[W]hen an alien credibly testifies to certain facts, those facts are deemed true . . .").

Absent any other explanation, it appears that the BIA's opinion could well

have been grounded in the understanding that an attempted rape is, in general, not sufficient to establish past persecution. The question of whether the BIA correctly so determined is a legal question that we review *de novo*. See *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088 (9th Cir. 2005). Doing so, I would hold under our precedents that the attempted rape could constitute past persecution, and remand for consideration of whether it did so here.

An act may constitute persecution even when it is attempted rather than actually completed. See, e.g., *Meza-Manay v. INS*, 139 F.3d 759, 764-765 (9th Cir. 1998). Thus, a determination that only considered the severity of the mistreatment that the police officer actually inflicted on Kaur, without taking into account what he attempted to do, i.e., rape her, is an invalid basis for the BIA's decision.

The majority seemingly concludes that even considering the incident as an actual attempted rape, the facts in the record do not compel a finding that Kaur was persecuted. That may be. But there is no indication in the record that the BIA made such a determination, so this cannot be the basis for denying her petition. *Navas v. INS*, 217 F.3d 646, 658 n.16 (9th Cir. 2000) (“[T]his court cannot affirm the BIA on a ground upon which it did not rely.”). The IJ never acknowledged that Kaur testified that the police officer was trying to rape her, and the BIA only stated that it “agree[d]” with the IJ’s determination that Kaur did not establish past

persecution, again without acknowledging Kaur’s testimony regarding attempted rape. So we have no reason to believe the BIA took the fact of an attempted rape into account at all. Rather than “guess at the theory underlying the . . . BIA’s opinion,” *Recinos de Leon v. Gonzales*, 400 F.3d 1185, 1194 (9th Cir. 2005) (quotation omitted), I would remand for clarification of the basis of the opinion, including explicit consideration of the testimony concerning attempted rape.